

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.K., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.S.,

Defendant and Appellant.

E065717

(Super.Ct.No. J262427)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Emily Uhre, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

At a contested jurisdiction hearing, the juvenile court declared A.K. (Minor) to be a dependent of the court. (Welf. & Inst. Code, § 300, subd. (b).)¹ Defendant and appellant E.S. (Father) contends his right of due process, in particular his right to notice, was violated by insufficient factual allegations in the Second Amended Petition. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Minor is female and was born in January 2015. M.K. (Mother) and Father were in a relationship for three years. Father began engaging in domestic violence after the first year of their relationship. Mother explained that Father “would drink whiskey and engage in abusive acts toward her. The last occurrence of domestic violence . . . occurred when [Mother] was pregnant with [Minor] and she sustained injuries that required hospitalization.” The abuse consisted of Father hitting, punching, and throwing Mother against a wall.

Mother never reported the abuse. Neighbors reported the last incident of domestic violence, which occurred while Mother was pregnant. Father was arrested. Father entered into a plea agreement and received a six-month jail sentence. A 10-year protective order, sought by the prosecutor, was entered to protect Mother from Father. When Minor was 10 days old, Mother moved to Idaho with the maternal grandmother. Mother moved back to California because the financial strain of traveling for court proceedings in California was too great.

¹ All subsequent statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

Mother stayed in an extended stay motel after returning to California. On October 2, 2015, Mother was arrested for credit card fraud related to paying for the motel room. Father was still incarcerated. San Bernardino County Children and Family Services (the Department) placed Minor in a foster home.

On October 8, the juvenile court returned Minor to Mother's care. On October 9, Mother tested positive for methamphetamines. Mother stated she and Father had a history of abusing methamphetamines together. After Father was released from jail, Mother went to Father's motel room so Father could see Minor. As a result, Father was arrested for violating the protective order. It was expected that Father would be incarcerated for six months. On October 19, the juvenile court ordered Minor be removed from Mother's care. Minor was placed in foster care.

Father admitted having a history of drug abuse, but asserted it had been 10 years since he abused drugs. Father said he loved Mother and intended to have a future with her. Father "stated that no social worker or Uncle Sam is going to tell him how to run his life. He stated that he is smarter than that. He said 'no judge is going to tell me what to do.' He stated that when he is out, he will immediately seek out [Minor] and the mother. 'No one is gonna tell me what to do.'" Mother said she wants to abide by the rules of the protective order, but that she loves Father and wants him to be part of Minor's life.

The Second Amended Petition, reflected, “The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or legal guardian to supervise or protect the child adequately . . . [¶] . . . [¶] [and/or] by the willful or negligent failure of the parent or legal guardian to provide the child with adequate food, clothing, shelter, or medical treatment [¶] [and/or] by the inability of the parent or legal guardian to provide regular care for the child due to the parent’s or legal guardian’s mental illness, developmental disability, or substance abuse.”

Under the foregoing section, there is a line that reads, “(State supporting facts concisely and number them b-1, b-2, b-3, etc.)” Under that line, in relation to Father, the following was written, “b-3[:] The alleged father, [E.S.], has a history of substance abuse which impedes his ability to provide adequate care and/or supervision for [Minor], thus placing the child at risk of abuse or neglect. [¶] b-4[:] The alleged father, [E.S.], has a history of engaging in domestic violence which places [Minor] at risk of serious harm.”

The juvenile court found both the substance abuse and domestic violence allegations to be true. The court said, “Specifically I’m looking at alcohol as the substance in this case.” The court found Father to be Minor’s presumed father.

DISCUSSION

Father contends his right of due process, in particular his right to notice, was violated by insufficient factual allegations in the Second Amended Petition. The Department asserts Father waived and forfeited the issue of insufficient factual

allegations by failing to raise it in the juvenile court. The Department explains that any alleged insufficiency in a petition's factual allegations must be raised in the juvenile court so it can be cured there. Father responds that he is not challenging the sufficiency of the allegations in the petition and thus has not waived or forfeited the issue. Rather, he is asserting his right of due process, in particular his right to notice, was violated by the insufficient factual allegations in the petition.

Father explains the difference between a due process argument and a sufficiency of the petition argument as follows: "A sufficiency of the petition claim turns on whether the petition stated a cause of action to support dependency court jurisdiction [¶] By contrast, a due process claim arises where the petition fails to provide the parent with adequate notice of the factual allegations against him or her." Rather than parse through the potential differences between an "insufficiency of the petition" contention and a "due process notice" contention, we will assume Father has raised a constitutional issue.

Father asserts that because this is a due process issue, it has not been forfeited and may be raised for the first time on appeal. Father is incorrect. "It is a general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived." (*Hershey v. Reclamation Dist. No. 108* (1927) 200 Cal. 550, 564.) Dependency matters are not exempt from the waiver rule. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "[I]t is generally true that 'constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal.' [Citation.] Even a claim that the defendant's due process right

to notice was violated may be waived by the failure to assert the claim in the trial court. [Citation.] The purpose of the waiver doctrine is to encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors and provide the defendant with a fair trial." (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.)

Because Father could have, but did not, object to the alleged insufficiency of the factual allegations in the juvenile court, he has forfeited the issue for appellate review. Nevertheless, we will address the merits of Father's argument because the matter is easily resolved and involves the potential for termination of a parent-child relationship.

"Fundamental to due process is the right to notice of the allegations upon which the deprivation of custody is predicated, and to notice of the time and place of the hearing. In other words, a parent is entitled to be apprised of the charges he must meet in order to prepare his case, and he must be given an opportunity to be heard and to cross-examine his accusers." [Citation.] [¶] The courts have phrased the question as whether the parent was provided meaningful notice of the charges." (*In re Stephen W.* (1990) 221 Cal.App.3d 629, 640.)

A petition must contain "[a] concise statement of facts, separately stated, to support the conclusion that the child upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted." (§ 332, subd. (f).) "The parent must be given notice of the specific facts upon which the petition is based to enable [him] to meet its allegations." (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 544.) For example,

allegations that merely repeat the statutory language do not provide sufficient notice.

(*In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397.) We apply the de novo standard of review to this constitutional issue. (*In re A.S.* (2009) 180 Cal.App.4th 351, 360.)

The first allegation against Father, in the Second Amended Petition, provides, “[Father] has a history of substance abuse which impedes his ability to provide adequate care and/or supervision for [Minor], thus placing the child at risk of abuse or neglect.” The allegation is troublesome in that it is unclear (1) what substance Father is alleged to have abused; (2) when Father is alleged to have abused the substance; and (3) why the child is currently at risk due to Father’s past behavior. A reader of the petition cannot decipher why exactly there was a need to remove Minor. For example, one could read the petition as reflecting Father has been sober for years yet Minor needs to be removed. This is a problem because a reasonable person cannot determine exactly what issue related to substance abuse the Department is alleging as a reason for Minor’s removal.

The second allegation against Father, in the Second Amended Petition, reads, “[Father] has a history of engaging in domestic violence which places [Minor] at risk of serious harm.” Again, the allegation is problematic because it is unclear (1) whom Father is alleged to have abused; (2) in what manner, i.e., stabbing, punching, Father is alleged to have abused the victim; (3) when Father is alleged to have abused the victim; and (4) why the child is currently at risk due to Father’s past behavior. A reader of the petition cannot determine why there is a current need to remove Minor. For example, one could read the petition as alleging Father engaged in domestic violence 15 years ago with a former girlfriend whom he no longer sees, yet the child is at risk. The petition is

too vague and generically written to provide meaningful notice of the Department's concerns. (§ 332, subd. (f) ["[a] concise statement of facts, separately stated".])

Accordingly, we conclude Father's right of due process was violated.

"Reversal is not required if the violation of the appellant's due process rights was harmless beyond a reasonable doubt." (*In re Sara D.* (2001) 87 Cal.App.4th 661, 673, fn. omitted.) The First Amended Detention Report, dated October 19, 2015, reflects, "[Mother] reported that [Father] would drink whiskey and engage in abusive acts toward her. The last occurrence of domestic violence the mother reported occurred when she was pregnant with [Minor] and she sustained injuries that required hospitalization." The Second Amended Detention Report, dated November 5, 2015, included the same quoted information about whiskey and domestic violence while Mother was pregnant. An attorney for Father was present at the hearings following the First and Second Amended Detention Reports. During the early stages of this case, Father was incarcerated "on domestic violence related charges."

Father was present at the February 4, 2016, contested jurisdiction hearing, having been released from jail the week prior to the hearing. At the beginning of the hearing, the First and Second Amended Detention Reports were received into evidence. There was no objection from Father's attorney, thus one can reasonably infer Father and his attorney had seen the First and Second Amended Detention Reports prior to the contested jurisdiction hearing.

Father testified at the hearing. The following exchange occurred:

“[Father’s Attorney]: I’d like to turn to allegation (b)(4), the allegation referenced regarding the allegation of domestic violence. Is there a history of domestic violence between you and [Minor’s] mother?”

“[Father]: Yes, sir.

“[Father’s Attorney]: Can you briefly describe that?”

“[Father]: We ran into issues while she was pregnant with the baby. So the last incident that we had was 18 months ago. That’s what put me in jail.” The foregoing exchange reflects Father was aware of the domestic violence incident that was of concern to the Department, and thus the basis of the domestic violence allegation.

On cross-examination by the Department, Father was asked, “You’re aware mother says you’re violent when you drink?” Father responded, “Correct.” On redirect examination, Father’s attorney asked, “Do you feel that you have a problem with alcohol?” Father replied, in relevant part, “This whole case is here because I couldn’t put down a bottle.” The Court asked, “So you agree that the domestic violence issues also involved your drinking?” Father responded, in relevant part, “I blamed it on the alcohol. I realize that’s not the real reason. That’s why I’m going to classes and find out [*sic*]. I don’t believe any of this would have happened if I was sober.” The court then asked, “So when the domestic violence issues happened you were drinking?” Father answered, “Yes, ma’am.”

Father knew the domestic violence was entwined with his alcohol abuse, and Father identified the domestic violence allegation as the same incident that concerned

the Department—the incident wherein Father drank and then injured Mother while she was pregnant. Father understood “[t]his whole case is here because I couldn’t put down a bottle.” Given the information in the reports, which it appears Father had been given before the jurisdiction hearing, and Father’s answers to questions reflecting his understanding of the exact alcohol and domestic violence issues that worried the Department, we conclude the lack of specific factual allegations in the Second Amended Petition was harmless beyond a reasonable doubt because Father and his attorney were aware, prior to the jurisdiction hearing, of the exact nature of the allegations against Father. Therefore, we conclude beyond a reasonable doubt that the vague wording in the Second Amended Petition did not contribute to the jurisdictional finding. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [harmless beyond a reasonable doubt standard].)

Father contends the error was prejudicial because he and his attorney were “ambush[ed]” by the alcohol questions asked on cross-examination and those asked by the juvenile court. Father asserts his attorney could have asked questions about alcohol abuse on direct examination if the Second Amended Petition had been more specific. There is nothing in the record indicating Father was surprised by unexpected questions relating to alcohol. To the contrary, the record reflects Father’s understanding that the whole case centered on his alcohol abuse. Father said, “This whole case is here because I couldn’t put down a bottle.” As explained *ante*, there are a variety of reports and answers to questions in the record that reflect Father and his attorney had a full understanding, in advance of the contested jurisdiction hearing, of the exact allegations

the Department was asserting against Father. Accordingly, we find Father’s argument that he was “ambush[ed]” to be unpersuasive.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.